United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1717

To be argued by
RALPH L McMURRY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel.
TIVIS TROIT HAWKINS, II,

Petitioner-Appellant,

-against-

J. EDWIN LaVALLEE, Superintendent,
Clinton Correctional Facility,

Respondent-Appellee.

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P/S

BRIEF FOR RESPONDENT-APPELLEE

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BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

Petitioner-appellant appeals from a decision of the United States District Court for the Southern District of New York, Griesa, J., denying without a hearing petitioner-appellant's application for a writ of habeas corpus. On May 23, 1974, this Court granted petitioner-appellant a certificate of probable cause and assigned counsel.

Questions Presented

1. Whether petitioner had a right to counsel at the show-up and whether the failure of his counsel to attend the show-up constituted a valid waiver of that right, and in any event whether the District Court erred in denying an evidentiary hearing on these issues?

2. Whether the District Court erred in denying an evidentiary hearing on the circumstances surrounding petitioner's out-of-court identification, and in any event whether the in-court identification of petitioner violated due process of law?

3. Whether the failure of petitioner's counsel to attend the hospital show-up deprived appellant of effective assistance of counsel?

4. Whether the District Court properly denied an evidentiary hearing on the voluntariness of petitioner's confession, and in any event, whether petitioner's confession was voluntary?

5. Whether the District Court properly denied an evidentiary hearing on the circumstances surrounding petitioner's arrest and the search of his living room, and in any event, whether petitioner's Fourth Amendment rights were violated?

Statement of Facts

Petitioner-appellant ("petitioner") is incarcerated in Clinton Correctional Facility as the result of a conviction in Westchester County Court, after a trial by jury in 1968, of murder in the first degree, attempted murder in the first degree, assault in the first degree, and robbery in the first degree. On May 24, 1968, he was sentenced by the Court (Sirignano, J.) to terms of life imprisonment, twelve and one-half to twenty-five years, five to ten years, and fifteen to thirty years, respectively, all of which are to run consecutively except for the attempted murder and assault counts which run concurrently with each other but consecutively with the others. Petitioner appealed to the Appellate Division, Second Department, which, on July 6, 1970, affirmed without opinion. On October 27, 1970, petitioner was denied leave to appeal to the Court of Appeals.

A. The Crime

Seven years ago a teen-age girl was murdered in Westchester County and her male companion's throat was slit. The facts surrounding these crimes, of which petitioner was convicted, were testified to at length in the course of the trial. In the early morning hours of July 17, 1967, in the hamlet of Purdys, New York, petitioner kidnapped, at gunpoint,

an eighteen year old girl, Jeanette Steinke, and a twenty-two year old man, Joseph M. Gagliardi. In the course of the kidnapping, he assaulted Miss Steinke and repeatedly struck her with a wrench, thereby fracturing her skull and causing her death. Petitioner then hid her body under a pile of peat moss bags on his employer's estate. In addition, he slashed Gagliardi's throat with a knife, severing both his windpipe and his esophagus. Then he loaded Gagliardi into the trunk of Gagliardi's own car, drove back to the point where petitioner first encountered the two, left Gagliardi's car with Gagliardi still in the trunk, returned to his own car and drove off.

B. Trial

At trial, one Gary Casson testified that while driving to work around 5 a.m. on the morning of July 17, 1967, he discovered the body of Joseph Gagliardi in the middle of the road (453-455).* Gagliardi was soaking wet, his pants were partially down, and his throat was cut (455-457). The witness promptly took steps to alert the New York State Police. A car, later proved to be Gagliardi's, was parked nearby in the bushes on one side of the road.

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* Numerical references refer to page numbers of transcript of state proceedings.

At approximately 5:30 a.m., two State police officers arrived, and five minutes later an ambulance arrived to rush Gagliardi to a hospital (459, 469, 520, 531). Meanwhile the police searched the scene, and a search of the car parked nearby turned up a pocketbook whose contents identified the owner as one Jeanette Steinke (472-475). The car was dusted for fingerprints, one of which later turned out to be petitioner's.

Dr. Frank Antonowich, Associate Attending Surgeon at Northern Westchester Hospital, testified that upon examining Gagliardi at 6:30 a.m. he discovered a throat wound seven or eight inches across severing both the windpipe and the gullet (484-485). Though conscious, Gagliardi was unable to speak because of his severed windpipe. However, he managed to write on a piece of paper the words "Nigger Knife" (484-86, 1202). Gagliardi was then taken into surgery, which lasted over five hours.

When Gagliardi recovered from the anesthesia administered him, he appeared to all the medical personnel who observed him to be clear, lucid and coherent (488, 497-98, 508, 510-11), just as he did before he was anaesthetized. By using the technique of holding his finger on the tracheal tube that Dr. Ivker inserted, Gagliardi was able to talk by

whispering. He was interviewed at approximately 1:30 p.m. by Investigator Conover of the State's Bureau of Criminal Investigation (BCI). While the record is silent as to what conversations took place during the interview, it is safe to assume that the victim related the events of the previous evening to the detective (512-13, 535-36).

Unfortunately for petitioner, Gagliardi lived to tell about these events at the trial. According to his testimony, he and Jeanette Steinke, a friend of his brother, left a bar in Croton Falls, New York at about 2 a.m. to go to Katonah, New York, where Miss Steinke lived. After they had travelled a little over a mile, Gagliardi realized that he had to go to the bathroom, so he pulled off the main road onto Dean's Bridge Road and drove about a quarter of a mile. He stopped the car, walked to the back, urinated and then reentered the car. As he was just starting the car, a man came up to the left side of the car and said "This is a stickup". Upon turning, Gagliardi stated that he saw a colored man, wearing dark sunglasses and carrying an automatic pistol. The robber got into the back seat of the car directly behind the driver and, with the gun at the back of Gagliardi's head, reached over the back of the front seat and removed Gagliardi's keys and silver from one pocket and forty-two dollars from the other. He then directed Gagliardi to turn the car around and head back towards Route 22 (835-837).

Upon returning to the intersection of Dean's Bridge Road and Route 22, Gagliardi saw a red Mustang parked there. The car had a dent in the driver's door and was without hub-caps. Gagliardi made a mental note of the car's license plate number.

Petitioner ordered Gagliardi to drive to a house some two miles away. Gagliardi and Miss Steinke were ordered into the house and forced to lie down on the bedroom floor. Petitioner then bound Gagliardi and tied him to a steel pipe in the cellar, and went back upstairs (837-844).

Three or four minutes later, petitioner returned to Gagliardi, put a bag over his head, and slit his throat. Gagliardi lost consciousness, but awoke an indeterminable time later feeling himself sprayed with cold water. He was, according to his testimony, still in the cellar. He again blacked out and when he again was conscious, he felt himself being dragged out of the cellar. Gagliardi testified that his chief concern at that point was to hold his head so that he could best control the bleeding. He heard a car trunk open and then the next thing he was aware of was his being placed in his own trunk. The car started and sometime thereafter, he was jolted back to consciousness by the car's sudden stop.

The driver apparently got out and simply walked away. When Gagliardi was sure that the driver had gone, he ripped some of the material that separated the trunk from the back seat and escaped onto the road where he was found by Gary Casson (844-848).

After surgery, Gagliardi was able to draw a rough map of the crime scene for police and give them the license number he had memorized. Armed with this information, the police launched an immediate and intensive inquiry. The police learned that the car bearing the license number memorized by Gagliardi was registered to one Tivis Troit Hawkins of Mt. Kisco, New York (536-540). Using the map drawn by Gagliardi (541), the police arrived at the estate of Rabbi Maurice Eisendrath, president of the Union of American Hebrew Congregations. Near a gardener's shed on the estate grounds the dead body of Jeanette Steinke was found under a pile of peat moss bags. She was lying face down, her feet tied together and her hands tied behind her back with neck ties. Her head had been severely beaten and was covered with blood, her eyes were swollen shut, and a gag had been placed in her mouth.

Further investigation took the police to a garage on the estate. The doors of the garage were open and inside was the red mustang car bearing the license number memorized earlier by ~~petitioner~~ Gagliardi (610-613).

Petitioner, a caretaker on the estate, was present in his apartment on the premises and was placed under arrest at about 3:15 p.m. The testimony conflicted on the circumstances of the arrest. Petitioner claimed he was arrested outside his home, but investigator Fairchild said he arrested petitioner at his doorway (614), and petitioner himself admitted this is where the first confrontation occurred (894).

Petitioner was taken to the police station for questioning. Within approximately two hours petitioner had confessed. The testimony at the trial concerning the circumstances of the confession was substantially the same as that offered at the Huntley hearing. See Huntley hearing, infra.

After completing the statements, petitioner was taken downstairs where he was photographed and fingerprinted (649). While petitioner was being processed, his wife and one Mrs. Hausserman arrived at the substation and asked to see

petitioner. Mrs. Hausserman had also summoned an attorney who had not then arrived. Approximately fifteen minutes after the attorney arrived, petitioner was allowed to consult with both his wife and the attorney (665).

Meanwhile, Investigator Conover had remained at the Rabbi's estate to pursue the investigation there. He asked Mrs. Hawkins for permission to search the apartment, who said "We have nothing to hide". Conover found nothing, but Mrs. Hawkins gave him a bloodstained khaki shirt, which was subsequently admitted into evidence along with a napkin from one of its pockets (550-551).

At approximately 7:15 p.m. petitioner was taken by the police to the hospital where he was viewed and identified by Gagliardi as the assailant.

During the trial, Gagliardi made an in-court identification of petitioner; petitioner's confession was introduced into evidence; and the shirt and napkin seized as evidence in petitioner's home was introduced into evidence.

Prior to the commencement of trial, petitioner moved to suppress the evidence of the alleged confession on the ground of involuntariness; to suppress the identification of him by Joseph Gagliardi; and to suppress the shirt and napkin

seized as evidence. Pursuant to these motions, the court conducted a Huntley, a Mapp and a Wade-Gilbert hearing.

C. Huntley Hearing

At the Huntley hearing, evidence was adduced to the effect that petitioner had been coerced into signing a document without reading or being aware of its contents; that the troopers choked and beat him, and mashed his toes, and told him that if he did not sign the documents, the troopers would shoot him while trying to escape. Petitioner also testified that he was not given his Miranda warnings (179-180).

On cross examination, petitioner stated that he was questioned in a small room at the police station (181-182). According to petitioner, one of the officers said to him "You did it! We're going to get a confession one way or the other" (191), and another officer grabbed him around the throat, squeezed hard, and cursed at him (192-193). Petitioner was then taken to the basement through a main room where his wife was waiting, but petitioner admitted that he did not then scream out what was being done to him. Petitioner said he was too busy watching where he was going because the police were stepping on his feet (196-197). Petitioner claimed that in the basement he was seated under a bright lamp and beaten. (200-206). Petitioner testified that finally he told the

police that whatever it was, he did it (207). At this point, the police took petitioner back upstairs, again through the main room, but again he did not scream out even though his wife and a friend, Mrs. Hausserman, were there. Petitioner claimed he was then threatened by an officer with a billy club (210-2). Petitioner denied giving the police any incriminating information in the admissions or signing the hand-written copy of the confession, but admitted signing the typed copy (210-221). After the confession, he complained to his wife and attorney about the beating (222-228) and complained of a bruised shoulder and swollen neck and sides. Petitioner was examined by a physician that night in the county jail, but did not complain to the doctor or the warden about his pain or treatment (229-232).

Edward Blum, the attorney called for petitioner, testified that twice he observed petitioner being taken to or from an interrogation room wearing only pants, but noticed nothing unusual about his gait and noticed no signs of trauma, cuts, bruises, or abrasions (250-252). Upon consulting with petitioner, Blum says he was told of "beatings and coercion" (257-261), but petitioner did not complain about being in pain except that his feet hurt, nor were there any signs of injury to his side (261-262).

Ernest Rosenberger, petitioner's trial counsel, testified that he conferred with petitioner for the first time at the arraignment. There petitioner told him he had been beaten into signing a confession. Rosenberger said petitioner was fully clothed, and saw no marks or bruises on him. He made no request for provisions preserving evidence of claimed injuries (271-272).

Petitioner's wife also testified. She said that before she was permitted to see her husband, he had confessed (134-135). She said he told her he had been beaten. She noted that his sides appeared puffed and swollen but saw no marks or bruises. She testified that while waiting to see her husband, she heard no loud voices or noises and saw no one strike him (132-134).

Mrs. Hausserman, petitioner's neighbor, also testified. She testified that she saw petitioner at the station at the same time as Mrs. Hawkins and noticed no marks or bruises on petitioner's body.

In contrast to the story told by petitioner of beatings, mashing, threats and so forth, is the testimony of the police officers involved. Investigator Curico of the New York State Police said he first saw petitioner at 4 p.m.

at the station wearing trousers but no shoes, socks, or hats. He identified both himself and Investigator Fairchild and gave petitioner his Miranda warnings. Petitioner replied "he did not do anything wrong and did not need a lawyer" (77). Petitioner said he was a caretaker on Rabbi Eisendrath's estate, and denied knowing either of the victims or being at the scene of the abduction the previous evening. Petitioner claimed he had been in Mt. Kisco the previous evening having sexual intercourse with a woman. Petitioner admitted he owned the car described by Gagliardi. Curico said he never threatened or abused petitioner in any way. On cross-examination Curico said that no stenographer or recording devise was used during the questioning. He also said petitioner was told he could make phone calls but that he declined to do so (80-81).

Investigator Simbari also testified that he gave petitioner his "Miranda" warnings, to which petitioner replied that "he knew all that" (89). Petitioner asked if he could see his wife if he told Simbari what he wanted to know, and Simbari replied that he could see his wife whether he told him anything or not (89). Petitioner then confessed. The statement was reduced to writing and it was read to petitioner who then signed it. The handwritten statement was then typed

up with a few changes, and again petitioner signed it, this time in the presence of a notary, at about 5:30 p.m. Simbari testified that he in no way threatened or struck petitioner, nor did anyone else in his presence. At no time did petitioner request an attorney.

Based on this evidence, the Court decided that the confession need not be suppressed. It stated:

> "From all of the credible evidence adduced at the hearing, the Court finds beyond a reasonable doubt:
>
> (1) That the defendant Tivis Troit Hawkins, II, was timely given the warnings as required by Miranda v. Arizona (384 U.S. 436), namely:
>
> (A) That the defendant was warned, prior to any questioning by the police, that he had the right to remain silent; and
>
> (B) That anything he said could be used against him in a court of law; and
>
> (C) That he had the right to the presence of any attorney; and
>
> (D) That if he could not afford an attorney one would be appointed for him prior to any questioning, if he so desired.

(2) That the defendant understood his rights as a result of such warnings by the police.

(3) That the defendant knowingly and intelligently waived his right to remain silent and his right to retained or assigned counsel and voluntarily made certain oral and written statements to the police.

(4) That the defendant was not in any manner compelled or coerced into making such oral and written statements.

(5) That the defendant, soon after the making of such statements, had the assistance and advice of counsel.

(6) That the same evening, upon his arraignment, the defendant was represented by counsel.

The Court, therefore, concludes that the oral and written statements made by the defendant to the police prior to his arraignment are admissible upon the trial of this indictment."

D. Wade-Gilbert Hearing

At the hearing, three witnesses testified that they had heard the police tell the attorney, Mr. Blum, that they (the police) were going to take petitioner to Northern Westchester Hospital to be viewed and identified. Investigator Conover testified that Mr. Blum, the attorney, introduced himself to the witness as petitioner's attorney. Conover, according to his testimony, told Blum that petitioner was

being charged with murder I. Thereafter, Blum consulted with his client for a period of time, after which Blum was informed that petitioner was going to be taken to Northern Westchester Hospital to be viewed by a victim and then to Town Court for North Salem to be arraigned (340-42). This testimony was confirmed by the other two witnesses, Investigators LaMontagne and Simbari (346, 350-51).

Edward Blum, the attorney, testified on direct examination that he was not told by anyone that petitioner was going to be taken to a hospital for viewing by one of the victims (321). However, on cross-examination, Blum amended this statement to say that he did not recall being told by the police that a showup was pending. He was sure, though, that the petitioner did not tell him so (321, 324-25). Furthermore, Blum admitted that after petitioner had left, Mrs. Hawkins told him that petitioner had been taken to the hospital to be viewed by one of the victims. At this point, he did not go to the police barracks to object to the procedure; nor did he tell the police that he did not want petitioner viewed by anyone; nor did he ask the police to stop such procedure (325-30).

On the question of the necessity for use of the show-up procedure, testimony was introduced by Dr. Milton Ivker, the surgeon who operated on Joseph Gagliardi (see p. 5, supra). He described Gagliardi's injuries, the surgical procedures used to save his life, and the victim's post-operative condition, in some detail (352-66). At the operation's conclusion, the patient had lost about half his normal blood (366-67). On cross-examination, the doctor said that he did not consider Gagliardi to be terminal (374). However, on redirect he elaborated on his prognosis in the following words:

> "My thinking on this is the following. We all know that the patient has survived. And in retrospect, it's difficult to be placed in a position that yes the patient could have died. At that time his vital signs were normal. Otherwise, we would have been there working on him and seeing why they weren't. If he needed more blood, we would have given him more, etc. But we also are aware that his hemoglobin was quite low. And we are aware that he had been in shock for an extensive period of time. He did tolerate surgery which took five and a half hours during which his hemoglobin was still low. And to be put in a position to say that I'm certain that he would not have died, no I can't do that. I'm aware that in spite of this, that he has survived. But if we felt certain that he was going to be in no danger, there would be no need to keep him in a special care unit. We would have sent him back to his room. So I can't say that this patient was out of danger.

> Otherwise, I repeat, I would have let him go to his room. I wouldn't have kept him there. I didn't feel that he was going to die. But I didn't think he was out of danger." (375)

Investigator Conover testified to the conditions of the show-up. At 7 o'clock, he phoned the hospital to inquire as to Gagliardi's condition and to ask permission to bring petitioner to the hospital to be identified. He was told by the floor nurse that Gagliardi's condition was critical and permission was given to bring petitioner to the hospital (378-79). At the show-up, petitioner was the only Negro in the room; the other people present were Investigators Simbari, LaMontagne and himself (384-386). Gagliardi made the identification by nodding his head and squeezing Conover's hand after being told that they had a suspect and would like to have him view the suspect for possible identification. Gagliardi, upon being asked if the man was the one who cut him, nodded in the affirmative.

Based upon this evidence, the Court found:

> "(1) The defendant was represented by counsel prior to and at the time that he was taken to the hospital to be viewed and that the defendant was not in any way, nor at any time, deprived of his right to counsel.

(2) The defendant's attorney was advised of the police intention to take the defendant to be viewed by a victim at the Northern Westchester Hospital before the police did so.

(3) The defendant's attorney was advised that the police had taken the defendant to be viewed by someone contemporaneously with the defendant's departure from the police barracks at Goldens Bridge.

(4) The defendant's attorney, with knowledge of these facts, had ample time to but did not at any time tell the police that he objected to such a procedure, nor did he tell the police that this was a deprivation of the defendant's rights.

(5) The victim, at the time of the confrontation, was in such a condition medically, that it was possible that he would not survive, and it would have been imprudent for the police not to have brought the defendant to his bedside so as to be certain that they had the right suspect.

(6) Under the totality of the circumstances it was imperative that the police immediately bring the defendant to the hospital so that the victim could see him and possible exonerate him, especially in light of his claims that he was beaten and coerced into making a confession.

The Court, therefore, concludes as a matter of law that the defendant was not denied the right to counsel prior to the alleged out of court identification, as is required by the recent decision in United States v. Wade (388 U.S. 218), and Gilbert v. California (388 U.S. 263); nor was his privilege against self incrimination violated.

> The Court further concludes that 'imperative' circumstances were present which necessitated the identification procedure used by the police. (Stovall v. Denno, 388 U.S. 293). The Court determines that the identification procedure used by the police was, under the circumstances, proper and in no wise violative of any right of the defendant; nor did such procedure amount to any denial to due process of law."

E. Mapp Hearing

On March 18, 1967, a hearing was held on petitioner's motion to suppress certain items seized as evidence, a so-called "Mapp Suppression Hearing". The motion papers stated that the motion was made to suppress evidence seized at petitioner's home and from the property wherein which he was employed as a caretaker. At the hearing, there was testimony from arresting officer Roger Fairchild and from Investigator Conover. The testimony was, in substance, the same as related earlier concerni the circumstances surrounding petitioner's arrest. Based upon this evidence, the Court found that the search of petitioner's house was legal and denied the motion to suppress. The Court stated:

"Upon the evidence adduced at this hearing, the Court finds that the police had reasonable cause to believe that the crime of murder had been committed and that defendant had committed such crime. Under these circumstances, the arrest of the defendant was lawful and the search was reasonable as being incidental to the said valid arrest." (408)

POINT ONE

PETITIONER WAS REPRESENTED BY COUNSEL AT THE TIME OF THE SHOW-UP AND HIS FAILURE TO ATTEND THE SHOWUP WAS A WAIVER. THE DISTRICT COURT PROPERLY DENIED AN EVIDENTIARY HEARING INTO THESE ISSUES. IN ANY EVENT, PETITIONER HAD NO RIGHT TO COUNSEL AT THE SHOW-UP.

Petitioner argues in Point Two of his brief that he had a right to counsel at the hospital show-up under the rule of United States v. Wade, 388 U.S. 218 (1967) and that this right could not be waived by counsel. This position is without merit.

The state court found that petitioner had a right to counsel at the show-up and was represented by counsel at the time of the show-up. The state court also found that the petitioner's attorney was advised of the prospective show-up but that the attorney failed to attend or object in any way. This constituted a clear waiver.

Counsel denied he was advised of the prospective show-up, although later he said he did not recall. Three state witnesses testified that he was so advised. This conflict raised an issue of witness credibility resolved against the petitioner, a resolution on which the District Court could justifiably rely. LaVallee v. Delle Rose, 410 U.S. 690 (1973). Moreover counsel admitted that once having learned that petitioner had been taken to the hospital he did nothing to halt or postpone the show-up that was obviously going to transpire (328-330). The state court's conclusion was clearly supported by the evidence. The District Court had ample basis to presume the State court's findings correct under the provisions of 28 U.S.C. § 2254(d) and correctly ruled that no evidentiary hearing was necessary.

Petitioner's argument that his alleged right to counsel at the show-up could not be waived by his attorney is totally without merit. Appellant cites no authority for this proposition. While questions of the validity of a waiver of constitutional rights are likely to arise where such rights are waived in the absence of an attorney, the presence of an attorney obviously insures against the invalidity of waivers. See Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970). Whether

the attorney was incompetent and his incompetence rendered the waiver involuntary or otherwise deprived him of effective assistance of counsel is another issue altogether. See Point Three, infra.

In any event, the petitioner's contention is without merit since petitioner was not entitled to have counsel present at the show-up. In Kirby v. Illinois, 406 U.S. 690 (1971), the United States Supreme Court held that the per se exclusionary rule of Wade did not apply to pre-indictment confrontations, such as the one here. Petitioner argues that Kirby is inapplicable because it was decided after the show-up in this case. However it is clear that Kirby may be applied retroactively. This Court has routinely applied the Kirby rule to pre-Kirby events. United States ex rel. Robinson v. Zelker, 468 F. 2d 159 (2d Cir., 1972).

Wade itself held only that a post-indictment pre trial lineup at which the accused is exhibited to identifying witnesses was a critical stage of the criminal prosecution at which the right to counsel attached (emphasis supplied). See Simmons v. United States, 390 U.S. 377, 382-383 (1968). While Wade also noted that it was necessary to scrutinize any pre-trial confrontation, 388 U.S. at 227, no rule requiring

counsel at every pre-trial confrontation was ever announced. The Supreme Court in Kirby noted that abuses of pre-indictment confrontations are nonetheless not beyond the reach of the Constitution, since the due process Clauses of the Fifth and Fourteenth Amendments forbid lineups unnecessarily suggestive and conducive to irreparable mistaken identification. 406 U.S. at 690-691. The Supreme Court in Kirby then stated specifically that Stovall v. Denno, 388 U.S. 293 (1967) "strikes the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interests of society in the prompt and purposeful investigation of an unsolved crime". 406 U.S. at 691. As shown in Point Two, infra, this case is the classic Stovall case.

POINT TWO

THE DISTRICT COURT PROPERLY DENIED AN EVIDENTIARY HEARING INTO THE CIRCUMSTANCES SURROUNDING PETITIONER'S OUT-OF-COURT IDENTIFICATION, AND IN ANY EVENT THE IN-COURT IDENTIFICATION OF PETITIONER DID NOT VIOLATE DUE PROCESS OF LAW.

Petitioner argues in Point One of his brief that the in-court identification was irreparably tainted by a suggestive out-of-court identification procedure, thus violating his rights to due process of law. This position is without merit.

The state court conducted a Wade-Gilbert hearing into the circumstances surrounding the identification of petitioner by Gagliardi. See Wade-Gilbert hearing, supra. Petitioner offers no reasons whatever for supposing the state court hearing inadequate under 28 U.S.C. § 2254(d) other than his own mere disagreement with its conclusion. The District Court had more than ample basis for presuming the state court's findings and conclusions correct under the provisions of 28 U.S.C. § 2254(d) and properly denied an evidentiary hearing into the question.

In any event, petitioner's position has no merit. The Supreme Court in Stovall v. Denno, supra at 301-302 first set forth the due process standard to be used in examining pre-trial confrontation. The question was said to be

> "Whether petitioner ... is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."

The Court stated that validity of the identification procedure was to be examined with reference to the "totality of the circumstances". This test has been repeatedly held to require two separate inquiries. In United States ex rel. Phipps v. Follette, 428 F. 2d 912 (2d Cir., 1970), this Court made one of the leading statements of this two-step process:

> "The first question is whether the initial identification procedure was 'unnecessarily' ... or 'impermissibly' suggestive. If it is found to have been so, the court must then proceed to the question whether the procedure found to be 'unnecessarily' or 'impermissibly' suggestive was so conducive to irreparable mistaken identification [Stovall] or had such a tendancy to give rise to a very substantial likelihood of irreparable misidentification [Simmons] that allowing the witness to make an in-court identification would be a denial of due process."

While one man showups similar to the case at bar may not be favored, Stovall v. Denno, supra, the Supreme Court significantly has declined to impose a per se rule. Rather, each case must turn on its own facts. Stovall v. Denno, supra; United States v. Kaylor, 491 F. 2d 1127 (2d Cir., 1973).

Stovall itself is factually very similar to the case at bar. There the victim's husband had been murdered and the victim herself was in critical condition as a result of an assailant's attack. A one-man showup occurred in the hospital room. The Court held that in these circumstances an immediate hospital confrontation was imperative. Adopting the language of the Court of Appeals, the Court said

> "No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action, and with the knowledge that Mrs. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station lineup, which Stovall now argues he should have had, was out of the question."

In the instant case, the facts available to the police at the time of the showup were very similar to those in Stovall and were equally compelling. Here there was a victim who was, seven hours after his operation, in critical condition in the hospital's Intensive Care Unit. While the surgeon expressed an optimistic prognosis, the objective facts remained that Gagliardi had been in shock for some period of time and had lost nearly half of his blood. The medical team and the chief surgeon had felt that Gagliardi was not out of danger and could have died. The police were faced with the possibility that Gagliardi might die soon, in which case the only person who could have identified the murderer would have been lost to the world forever. That Gagliardi ultimately survived did not render the objective circumstances at the time of the show-up any less compelling.

Stovall is clear authority for upholding the identification procedure in the case at bar. Petitioner's suggestion (brief, p. 19) that this Court should not concern itself with the factual pattern of Stovall is clearly untenable. The Supreme Court in Stovall rested its decision squarely on the facts of that case. Foster v. California, 394 U.S. 440 [1969], cited by petitioner is clearly distinguishable from the case at bar since it involved repeated confrontations between victim and suspect, making the identification there "all but inevitable".

Petitioner makes much of Gagliardi's use of the word "Nigger". He argues that this shows that Gagliardi was prejudiced against Black people and that to prejudiced people all Black people look alike. Accordingly, the out-of-court procedure is said to have been all the more unreliable. Petitioner's argument on this score - which he characterizes variously as "logic" and a "recognized phenomenon in the behavorial sciences" - is in fact unaccompanied by any evidence and is pure speculation. Furthermore, the argument overlooks the fact that Gagliardi had just recently had his throat cut and was in a near state of shock. That Gagliardi may have described his assailant in hostile language under such circumstances is not difficult to understand.

Assuming arguendo however that the showup was unnecessarily suggestive, it does not follow that the evidence of identification must be excluded. Haberstroth v. Montanye, 362 F. Supp. 838 (W.D.N.Y., 1973), affd. 494 F. 2d 483 (2d Cir., 1974); United States ex rel. Gonzalez v. Zelker, 477 F. 2d 979 (2d Cir., 1973). Rather, the second inquiry of the two-prong inquiry set forth in Phipps, supra, and other cases comes into play, namely whether the unnecessarily suggestive procedure was so conducive to irreparable mistaken identification or had such a tendency to give rise to a very substantial likelihood of irreparable misidentification that allowing the witness to make an in-court identification would be a denial of due process.

This inquiry again turns on the "totality of the circumstances", Neil v. Biggers, 409 U.S. 188 (1972), and involves an appraisal of such external factors as

> "the opportunity of the witness to view the criminal at the time of the crime, the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."
> Neil v. Biggers, supra at 199.

Since each case must be judged on its own facts, precedent is of little value in such cases as this, and the "totality of circumstances" test is necessarily extremely general. United States ex rel. Cannon v. Montanye, 486 F. 2d 263, 267 (2d Cir., 1973); United States ex rel. Gonzalez v. Zelker, 477 F. 2d 797, 801 (2d Cir., 1973). Applying the factors set forth as guidelines in Neil v. Biggers, supra, to the case at bar, it is clear that there was no substantial likelihood of misidentification. Gagliardi had several hours to make observations of his assailant. On several occasions he testified he got a "good look" and a "really good look" at his assailant in the house, where the lights were on (842-843). The fact that he made a mental note of the license number of his assailant's car and was able to draw a map of the crime scene later shows that he had been able to keep alert and absorb great detail despite the trauma to which he was being subjected. Compare United States ex rel. Bisordi v. LaVallee, 461 F. 2d 1020 (2d Cir., 1972) (impermissible suggestion in identification procedure, but no substantial likelihood of misidentification where, inter alia, victim had three minutes to observe defendant in good light); United States ex rel. Smiley v. LaVallee, 473 F. 2d 682 (2d Cir., 1973) (identification upheld where, inter alia, victim had ten minutes to observe defendant at close quarters); United States ex rel. Phipps v. Follette, supra (identification evidence allowed

where, inter alia, victim struggled with assailants twenty to thirty seconds); Haberstroth v. Montanye, supra (identification evidence allowed where, inter alia, victim had "ample" time of twenty minutes to view robbery); United States ex rel. Rutherford v. Deegan, 406 F. 2d 217 (1969) cert. denied, 395 U.S. 963 (identification evidence allowed where, inter alia, victim made deliberate attempt to study face of assailant).

In addition, Gagliardi showed no hesitation in identifying appellant as his assailant. Moreover the length of time between crime and confrontation - about fifteen hours - was comparatively short. Compare United States ex rel. Carnegie v. MacDougall, 422 F. 2d 353 (2d Cir., 1970), cert. denied, 398 U.S. 912 (identification evidence allowed where, inter alia, showup occurred three months after crime); United States ex rel. Rutherford v. Deegan, supra (identification evidence allowed where, inter alia, showup occurred eleven days after the crime).

In assessing the reliability of an identification, the law permits recourse to corroborative evidence. Thus, Gagliardi's description of a car and license number later found to belong to petitioner, the resultant finding of Miss Steinke's body on the grounds near petitioner's home, petitioner's confession, and, perhaps most damning of all, petitioner's fingerprint on Gagliardi's car, constitute overwhelming corroborative evidence demonstrating that Gagliardi's

identification of appellant was correct beyond a reasonable doubt. Compare United States ex rel. Gonzalez v. Zelker, supra (accumulated circumstantial evidence held to fully substantiate identification); United States ex rel. Cummings v. Zelker, 455 F. 2d 714 (2d Cir., 1972) (defendant's confession constituted substantial additional evidence of guilt).

Thus, even assuming the identification procedure was constitutional error, it was harmless beyond a reasonable doubt since these objective corroborative facts leave no room whatsoever for doubt as to petitioner's guilt. See Chapman v. California, 386 U.S. 18, 24 (1967); United States ex rel. Ross v. LaVallee, 448 F. 2d 552 (2d Cir., 1971); Harrington v. California, 395 U.S. 250 (1969). As was said in the case of Milton v. Wainwright, 407 U.S. 371, 377-378 (1972):

> "The writ of habeas corpus has limited scope; the federal courts do not sit to retry cases de novo but rather, to review for violation of federal constitutional standards. In that process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court..... ." (emphasis added)

POINT THREE

FAILURE OF PETITIONER'S COUNSEL TO ATTEND THE HOSPITAL SHOWUP DID NOT DEPRIVE PETITIONER OF EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner argues in Point Three of his brief that even if the failure of his counsel to attend the hospital show-up constituted a valid waiver of petitioner's right to counsel, his attorney was grossly negligent in this failure and petitioner was accordingly deprived of effective assistance of counsel.

This issue was never raised in the state courts, and accordingly should not be considered here for failure to exhaust available state remedies, 28 U.S.C. § 2254(b) and (c). United States ex rel. Nelson v. Zelker, 465 F. 2d 1121 (2d Cir., 1972); United States ex rel. Gibbs v. Zelker, ___ F. 2d ___ (2d Cir., 1974). In addition, since this issue was never raised in the District Court, it is not subject to review by this Court. Furthermore, petitioner's argument is totally without merit.

At the outset it is difficult to understand petitioner's suggestion that an attorney's acts or omissions can constitute both a valid waiver of constitutional rights and incompetence amounting to a deprivation of the effective assistance of counsel, all at the same time. Brady v. United States, supra; McMann v. Richardson, supra.

In any event it cannot seriously be maintained that petitioner's counsel was incompetent in failing to attend the hospital show-up when, as noted above, Point One, supra, petitioner didn't even have a right to counsel at the show-up. Moreover, the failure of petitioner's counsel to attend did not deprive petitioner of the effective assistance of counsel under the time-honored test set forth by this Court in United States v. Wight, 176 F. 2d 376 (2d Cir., 1949), cert. denied 338 U.S. 950. In Wight this Court held:

> "The proof of the efficiency of such assistance lies in the character of the resultant proceedings, and unless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus.
>
> "A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice... ."

It cannot seriously be maintained under the circumstances here, that petitioner's counsel's failure to attend the hospital show-up was such an omission as to "shock the conscience" of the Court. Under the imperative circumstances resulting from Gagliardi's physical condition counsel could have done little to make the show-up any fairer than it was. At

the most, the failure of counsel to attend the show-up was an error of judgment, but mere error or even possible neglect does not rise to the level of such incompetence as to constitute ineffective assistance of counsel. As this Court said in United States v. Garguilo, 324 F. 2d 795, 796 (2d Cir., 1963):

> "errorless counsel is not required, and before we may vacate a conviction there must be a total failure to present the cause of the accused in any fundamental respect."

Certainly there was no "total failure" here to present the cause of the accused. The circumstances of the out of court identification were explored fully by defense counsel at the Wade hearing and trial if not at the show-up itself. Thus petitioner's rights have been fully protected on this score. Finally, it must be noted that assuming arguendo petitioner was deprived of effective assistance of counsel, it does not follow that habeas corpus relief is the automatic result. United States ex rel. Marcelin v. Mancusi, 462 F. 2d 36, 45 n. 14 (2d Cir., 1972). Where, as here, the independent evidence against appellant is overwhelming, it would be improper to grant habeas corpus relief notwithstanding constitutional error. See discussion of corroborative evidence, Point Two, supra. at p. 32-33.

POINT FOUR

THE DISTRICT COURT PROPERLY DENIED AN EVIDENTIARY HEARING INTO THE VOLUNTARINESS OF PETITIONER'S CONFESSION AND IN ANY EVENT PETITIONER'S CONFESSION WAS VOLUNTARY.

Petitioner argues in Point Four of his brief that the totality of the circumstances surrounding his confession was such as to cast serious doubt on whether the state met its burden of proof as to the voluntariness of the confession. He concludes an evidentiary hearing should have been ordered by the District Court. This position is without merit.

In the Huntley hearing, petitioner claimed he was not given his Miranda warnings and that his confession was beaten out of him. The police offered quite a different version of the facts. The Huntley hearing judge conducted a thorough inquiry into the circumstances surrounding the confession, applied the proper constitutional standards, and made comprehensive findings of fact and conclusions of law. The state court, faced with critical issues of witness credibility, resolved these issues against petitioner. In these circumstances, the District Court "could have been reasonably certain that the state court would have granted relief if it had believed respondent's [petitioner's] allegations", LaVallee v.

Delle Rose, supra. Accordingly, there can be no doubt that the proceedings in the state trial court met the requirements of 28 U.S.C. § 2254(d), LaVallee v. Delle Rose, supra, and the District Court was correct in so finding.

The only evidence of brutality was petitioner's own unsubstantiated claims. These claims were contradicted flatly by the police officers involved. Petitioner himself testified that he never complained to the doctor who examined him the first night of his detention. Nor did petitioner complain to the warden. Petitioner's first attorney testified that he saw no signs of any injury to his feet or sides, or any signs of trauma, cuts, bruises, or abrasions, and that petitioner did not complain about being in pain. Petitioner's second attorney testified that he saw no marks or bruises on petitioner, and made no request for any provisions for the preservation of evidence of alleged injuries. See Huntley Hearing, supra.

Where, as here, there is no direct or objective evidence save the self serving and highly colored account of a defendant himself that he was beaten, he is not entitled to have his conviction set aside on the ground of the involuntariness of the confession. United States ex rel. Cerullo v. Follette, 416 F. 2d 156 (2d Cir., 1969). Compare United States ex rel. Everett v. Murphy, 329 F. 2d 68 (2d Cir., 1964), where

this Court declined to consider petitioner's version of beatings, where it was controverted by denials of physical abuse and supported if at all, by evidence of a "bruised shin". Here petitioner has not even the benefit of a bruised shin to buttress his claim.

Petitioner, in his original application for habeas corpus relief, stated only that his confession was "the product of a physical beating". Nowhere did the petitioner raise, in any form, an issue which would, in the light of the Huntley hearing, warrant a new factual determination of the issue of voluntariness of his confession. The burden of showing by convincing evidence that the state court determination is erroneous is petitioner's, and that burden has not been met. E.g., United States ex rel. Coronan v. Mancusi, 444 F. 2d 51 (2d Cir., 1971).

Under all these circumstances, it is not surprising that petitioner offers this Court no persuasive reasons whatever for supposing that the state court Huntley hearing was inadequate under any of the statutory exceptions of § 2254(d), other than his own disagreement with the state court's conclusions. Accordingly the District Court properly presumed

the state court findings correct and declined to hold an evidentiary hearing.

On this appeal, petitioner for the first time makes much of alleged "psychological" coercion. This issue was not presented to the state courts and thus petitioner has failed to exhaust available State remedies as required by 28 U.S.C. § 2254(b) and (c). Moreover, this issue was not presented below and therefore is not properly before this Court for review. In any event, the claim is without merit. The mere fact petitioner had no shoes, socks, or shirt, even if true, is not necessarily psychologically coercive and in any event would not per se render the confession involuntary. Petitioner's reliance on Culombe v. Connecticut, 367 U.S. 568 (1961) is not apt -- there the critical fact was that the accused was a suggestible mental defective who was questioned over four days. Nor was petitioner's interrogation -- over a period of several hours -- so long or so intense as to be overbearing of his will. The interrogation here is a far cry from those disapproved of in such cases as Davis v. North Carolina, 384 U.S. 737 (1966) (one hour interrogation a day for sixteen days); Clewis v. Texas, 386 U.S. 707 (1967)

(eleven days of questioning, including intermittent questioning over 38 hour period prior to arraignment); Mancusi v. United States ex rel. Clayton, 454 F. 2d 454 (2d Cir., 1972) (two days of constant and persistent police questioning, coupled with doubt that accused had adequate food and sleep). The other factors cited by petitioner -- that he was Black and in handcuffs whereas the police officers were White -- border on the frivolous and in any event could not be said in and of themselves to render an otherwise voluntary confession inadmissible. Finally, it is clear that there was no threat to hold petitioner incommunicado until a confession was forthcoming. Haynes v. Washington, 373 U.S. 503 (1963).

POINT FIVE

THE DISTRICT COURT PROPERLY DENIED AN EVIDENTIARY HEARING INTO THE CIRCUMSTANCES SURROUNDING PETITIONER'S ARREST AND THE SEARCH OF HIS HOME, AND IN ANY EVENT PETITIONER'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED.

In Point Five of his brief, petitioner argues that the search of his home following his arrest violated his Fourth Amendment rights, and that the District Court should have conducted an evidentiary hearing into this claim. This argument is without merit.

The state court conducted a thorough Mapp hearing into the legality of the arrest and search. See Mapp Hearing, supra. The state court made findings of fact based in part on an assessment of the credibility of witnesses, LaVallee v. Delle Rose, supra, and applied the proper standards of constitutional law to those facts.

There can be no doubt that the state court hearing falls into none of the statutory exceptions of § 2254(d), and accordingly the District Court ruled properly in presuming the state court's findings and conclusions correct. The only reason offered by petitioner for suggesting that the state court proceedings were inadequate is the conclusory claim that on this issue the law and facts "blend" together. In any event the claim is totally without merit. Petitioner apparently concedes that the arrest was based on probable cause. He complains, however, that the search incident to the arrest extended beyond the permissible parameters as set forth in Chimel v. California, 395 U.S. 742 (1969), and Shipley v. California, 395 U.S. 818 (1969).

Even assuming the arrest of petitioner in his doorway did not justify a search of his living room under Chimel, the fact remains, as the District Court noted, that Chimel is not retroactive, Williams v. United States, 401 U.S. 646

(1971), and under the pre-Chimel law an arrested person's dwelling could be searched incident to a valid arrest. United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947).

In any event, the search of the living room was conducted with the consent of Mrs. Hawkins. Mrs. Hawkins was asked by the police for permission to search the premises, and said "We have nothing to hide". Indeed, the search turned up nothing until Mrs. Hawkins gave the police the khaki shirt and a napkin from one of its pockets whose admissibility is at issue. It is true that in search cases "consent is not lightly to be inferred", United States v. Ellis, 461 F. 2d 962 (2d Cir., 1972), but under the "totality of the circumstances", Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the circumstances here clearly show consent within parameters set forth by this Court. E.g., United States v. Ellis, supra (consent by accused's girl friend even though under arrest); United States v. Candella, 469 F. 2d 173 (2d Cir., 1972) (consent where accused, upon request, pointed to guns). In accord, Frazier v. Cupp, 394 U.S. 731, 740 (1969).

Assuming arguendo the admission of the napkin and khaki shirt was constitutional error, such error was harmless beyond a reasonable doubt. The napkin, which was similar to the one used as a gag in Miss Steinke's mouth, and the blood-stained shirt were only a small part of the total overwhelming evidence against petitioner. See discussion of independent corroborative evidence, Point Two, supra, at p. 32-33 .

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
October 3, 1974

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GLORIA KIRNON , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent/Appellee herein. On the 3rd day of October , 1974 , she served the annexed upon the following named person :

James B. Zane, Esq.
Zane & Zane
One Rockefeller Plaza
New York, New York 10020

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Gloria Kirnon
GLORIA KIRNON

Sworn to before me this
3rd day of October , 1974

Ralph J McMunn
Assistant Attorney General
of the State of New York